In the Matter of:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

ARB CASE NO. 12-042

ALJ CASE NO. 2011-LCA-009

PROSECUTING PARTY,

DATE: December 23, 2013

v.

S V TECHNOLOGIES, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Vinod Sadhu, pro se; *S V Technologies, LLC,* Indianapolis, Indiana

For the Respondent:

Mary J. Rieser, Esq.; Paul L. Frieden, Esq.; William C. Lesser, Esq.; Jennifer S. Brand, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Washington, District of Columbia

Before: Paul M. lgasaki, *Chief Administrative Appeals Judge;* Joanne Royce, *Administrative Appeals Judge;* and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the E-3 provisions of the Immigration and Nationality Act, (INA), 8 U.S.C.A. § 1101(a)(15)(E)(iii) (Thomson / West 2013) and the applicable regulations at 20 C.F.R. Part 655 (2013).[1] Rupal Vora filed a complaint with the United States Department of Labor's (DOL) Wage and Hour Division (WHD) alleging that his employer, S V

[1] The INA establishes an E-3 Labor Conditions Application (LCA) program for aliens who are nationals of the Commonwealth of Australia. E-3 workers enter the United States to perform temporarily services in specialty occupations. 8 U.S.C.A. § 1101(a)(15)(E)(iii); 8 U.S.C.A. § 1182(t)(1). Congress has delegated authority to administer the E-3 program to the Secretary of Labor. 8 U.S.C.A. § 1182(t)(3); 20 C.P.R. Part 655 Subparts H and I. The Department of Labor regulations implementing the H-1 B non-immigrant visa program also apply to the E-3 non- immigrant program. *See* 20 C.F.R. § 655.0(d) (2010) (Subpart H sets forth procedures for filing LCAs to obtain H-1B, H-1B1 and E-3 visas; Subpart I "establishes the enforcement provisions that apply to the H-1B, H-1B1, and the E-3 visa programs.").

Technologies (SVT), violated the INA by failing to pay wages to which he was entitled. The WHD found in Vora's favor. SVT timely requested a hearing before an Administrative Law Judge (ALJ). On April 28, 2011, the ALJ also found in Vora's favor and issued a Decision and Order Granting Summary Decision In Part and Cancelling Hearing. SVT appealed to the Administrative Review Board (ARB or Board). We affirm the ALJ's partial summary decision concluding that SVT owes back wages to Vora in the amount of $30,499.51.

BACKGROUND[2]

SVT sponsors non-immigrant workers and places them on information technology projects with third-party businesses. Vinod Sadhu is part owner and president of SVT. On April 26, 2006, SVT filed an LCA with the DOL's Employment and Training Administration (ETA) to employ Rupal Vora, an Australian, on an E-3 Visa.[3] Vora entered the United States on December 8, 2007, and entered into employment with SVT on December 11, 2007. During his tenure with SVT, Vora lived rent-free in one of SVT's guest houses.

Within two weeks of hiring Vora, SVT determined that he lacked necessary skills. SVT evaluated Vora again after four weeks of training and decided to terminate his employment. SVT's president, Sadhu, discharged Vora effective January 31, 2008, and asked Vora to leave the country. SVT Resp. Mot. S.D. at 1-2.

On or about January 31, 2008, Sadhu verbally informed the United States Citizenship and Immigration Service (USCIS) that SVT had terminated an E-3 employee. USCIS asked for a reference number for the terminated employee. Sadhu did not provide Vora's reference number, did not inform USCIS of Vora's name, and did not follow up with USCIS to provide the necessary documentation. SVT Resp. Mot. S.D. at 3, 6. Sadhu was aware that USCIS would be unable to cancel Vora's visa without the requested information. Admin. Mot. for S.D. Ex. E-1, p. 170 (Sadhu deposition testimony).

After January 31, 2008, Vora stayed in the United States and continued to participate in SVT training and continued to receive potential employment projects from SVT. Vora also worked with SVT to have his E-3 visa renewed or extended in April, May, and August 2008. Vora left the United States on September 17, 2008. In December 2008, Vora filed a complaint with WHD alleging that he received no wages from December 11, 2007, to September 16, 2008. SVT claimed that Vora had been terminated and was not owed wages. SVT also argued that Vora received no wages from his start date to his alleged termination date because this income was offset for expenses related to housing, food, and training.

On December 17, 2010, the Administrator issued a determination letter that SVT violated the E-3 provisions of the INA by failing to pay wages in violation of 20 C.F.R. § 655.731 and

[2] The background facts are taken from the ALJ's partial summary decision and associated briefing. In providing background facts, we make no findings of fact and view the record in the light most favorable to SVT, the non-moving party.

[3] To hire an E-3 worker, the employer must complete and file an LCA with the ETA. 8 U.S.C.A. § 1182(t)(l); 20 C.F.R. § 655.730. In the LCA, the employer must make representations regarding its responsibilities under the program, including a representation that the E-3 worker will receive certain specified wages. 8 U.S.C.A. § 1182(t)(l)(A)(i).

failing to provide notice of the filing of an LCA in violation of 20 C.F.R. § 655.730. The Administrator ordered SVT to pay Vora back wages in the amount of $38,077.03. SVT filed objections and requested a hearing. The case was assigned to an ALJ who scheduled a hearing for May 10, 2011.

1. Partial summary decision and order

On or about April 14, 2011, the Administrator submitted a motion for summary decision on the grounds that SVT violated the E-3 regulations because it did not effect a bona fide termination, did not pay Vora required wages, and failed to post LCA notices in an appropriate manner. Admin. Mot. for S.D. at 5, 6-10, 15. The Administrator acknowledged SVT's statements about not knowing Vora's reference number but argued that lack of knowledge was not an excuse for failing to follow up and perfect a bona fide termination. Admin. Mot. for S.D. at 10-11.

Moreover, the Administrator pointed out that the record showed that Vora continued to live rent-free in housing provided by SVT and that SVT was working with Vora to provide additional training and secure employment well after January 31. The Administrator, for example, offered several e-mails that showed SVT's continued employment relationship with Vora. The Administrator offered a July 25 letter from SVT describing Vora as a current employee of SVT. The Administrator also claimed that SVT was not entitled to deduct expenses for room, board, and training from the wages that it owed Vora because the expenses were not authorized by Vora in advance, were not in writing, did not benefit Vora, and exceeded the amount allowed by law. Admin. Mot. for S.D. at 13-15.

SVT claimed that it was not responsible for paying wages after its alleged termination date. SVT disagreed with the Administrator's assessment of wages and argued that it was entitled to deduct expenses from wages. SVT also claimed that it did post the LCA notice at the place of employment. SVT characterized the e-mails sent to Vora as mass recruiting e-mails. SVT Resp. Mot. S.D. at 4.

SVT also disputed the authenticity of the July 25, 2008 letter that stated that Vora was an SVT employee. SVT Resp. Mot. S.D. at 5. SVT claimed that the letters dated April 24, May 2, and August l, 2008, which the Administrator cited, were associated with E-3 sponsorship and restamping when an E-3 employee leaves the country. An E-3 extension, however, requires no stamping. SVT argued that the correspondence showed that it was helping Vora leave the country through a renewal and not extending his employment through an extension.

On April 28, 2011, the ALJ issued his partial summary decision and order (D. & O.) which held that SVT failed to pay Vora compensation in violation of 20 C.F.R. § 655.731. The ALJ reasoned that SVT did not effect a bona fide termination because it failed to inform the USCIS of the identity of the terminated E-3 employee and continued to treat Vora as an employee despite claiming that Vora had been fired.[4] The ALJ noted that the e-mails

[4] A bona fide termination requires a three-step process, and the employer bears the burden that it took all three steps. *Gupta* v. *Jain Software Consulting, Inc.*, ARB No. 05-008, ALJ No. 2004-LCA-039, slip op. at 5 (ARB Mar. 30, 2007). One step requires an employer to notify the USCIS that the non-immigrant employee has been terminated so USCIS can cancel the petition. 20 C.F.R. § 655.731(c)(7)(ii). SVT notified USCIS verbally that it terminated an unidentified employee but did not identify Vora as the terminated employee.

specifically addressed to Vora show Vora's continued employment relationship with the company. D. & O. at 5. The ALJ determined that the communications were inconsistent with the premise that SVT fired Vora and consistent with Vora's continued employment and intent to extend his visa in the spring of 2008.[5] Because SVT failed to effect a bona fide termination, the ALJ ruled that SVT owed Vora the wages indicated on the LCA for all productive and employment-related, non-productive time from the date of his employment until his departure from the United States. D. & O. at 6.

The ALJ also denied SVT' s claim that its housing, food, and training expenses offset Vora's owed wages. The ALJ concluded that there was no evidence that the deductions were either voluntary, written or "principally for the benefit of the employee." *See* 20 C.F.R. § 655.731(c)(9). The ALJ determined that SVT owed wages in the amount of at least $30,499.51 but found a material question of fact remained as to whether Vora was on vacation during a specified eight-week period and thus was not owed wages for that period in voluntary non-productive status. D. & O. at 7-8. The ALJ also concluded that a material question of fact remained as to whether SVT had complied with LCA posting requirements. D. & O. at 4, 8. The ALJ set these remaining disputed facts for hearing on December 6, 2011.

2. Consent order

After the partial summary decision order, the case was set for hearing on the remaining questions of material fact concerning whether Vora was in a voluntary non-productive status (on vacation) for a portion of his employment and whether the LCA notice was properly posted. Before hearing, counsel for the Administrator informed the ALJ that the parties had reached a settlement as to these two contested issue. The parties submitted settlement-and-consent findings in a document entitled Stipulation and Settlement Agreement Resolving Issues Left Unresolved by the April 28, 2011 Decision and Order Granting Summary Decision in Part and Cancelling Hearing. (settlement agreement). SVT agreed to pay the stipulated sum of $4,000.00 to resolve the contested facts regarding 1) the issue of wages due for the disputed eight-week period of non-productive time and 2) the alleged failure to post the LCA. The agreement explicitly waived any right to dispute or appeal the parties' stipulations but reserved the right to appeal the ALJ's finding that SVT failed to effect a bona fide termination and the award of $30,499.51. On January 13, 2012, the ALJ issued an order approving the settlement. Decision and Order Approving Consent Findings (consent order).

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review an ALJ's decision arising under the H-1B provisions of INA.[6] The Department of Labor regulations governing the H-1B program also

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[5] The ALJ concluded that the authenticity of the July 25, 2008 letter stating that Vora was an SVT employee was not dispositive because there was no genuine issue of material fact that the termination was not bona fide. D. & O. at 6.

[6] *See also* Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). The Secretary's Order explicitly delegates to the ARB the Secretary's authority to review cases arising under 8 U.S.C.A. § 1182(n) and 20 C.F.R. Part 655 (Subpart I). Regulation 20 C.F.R. § 655.0(d) provides that "Subpart I of this part

apply to the E-3 program. Under both programs, the Board has authority to issue final agency decisions.[7] We review a grant of summary decision de novo, i.e., under the same standard that the ALJs apply. This standard is set forth at 29 C.F.R. § l8.40(d). The ALJ is permitted to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision."[8] We view the record on the whole in the light most favorable to SVT, the non-moving party.[9]

DISCUSSION

1. Settlement and consent order

On February 13, 2012, SVT filed a Request for Review by the Administrative Review Board (request for review). The request does not clearly specify the issues for which appeal is sought and appears to be requesting review of both the April 28, 2011 D. & O. as well as the January 13, 2012 consent order.

SVT argues that the ALJ unfairly denied a continuance of the hearing scheduled to address the unresolved issues. SVT claims it was forced to participate in negotiations leading to the consent order, which resulted in cancellation of the hearing, because it was unable to attend the scheduled hearing date and the ALJ declined to postpone it. SVT' s opening brief, however, concedes that SVT explicitly waived its right to challenge the validity of the consent order, including any argument that it was forced to agree because the ALJ denied a continuance. SVT Br. at 9. We therefore decline to address SVT's arguments pertaining to the settlement agreement.[10] We turn now to SVT's arguments regarding the ALJ's partial summary D. & O.

2. Respondent failed to effect a bona fide termination

SVT raises several concerns but fails to provide a substantive legal argument as to the ALJ's error or why summary decision was inappropriate. SVT insists that the adjudication was biased in favor of the employee but makes no factual or legal argument in support of this view. Request for Review at 1. SVT also notes that Vora waited several months before complaining about owed wages but does not explain how this is relevant.

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establishes the enforcement provisions that apply to the H-1B, H-1Bl, and E-3 visa programs." Thus, while the Secretary's Order does not explicitly delegate to the ARB authority to review E-3 cases, the regulations at 20 C.F.R. Part 655, referred to in the Secretary's Order, explicitly provide that E-3 cases shall be enforced the same as H-IB cases. Regulation 20 C.F.R. § 655.845 (Subpart I) allows for review of H-1B cases to the ARB, and since the regulations state that E-3 cases shall be enforced in the same manner as H-IB cases, we assume jurisdiction of this E-3 case.

[7] 20 C.F.R. § 655.0(d); 20 C.F.R. § 655.845.

[8] 29 C.F.R. § 18.40(d).

[9] *Gonzalez v. J.C. Penney Corp.*, ARB No. 10-148, ALJ No. 2010-SOX-045, slip op. at 7 (ARB Sept. 28, 2012).

[10] In any case, SVT provides no authority to support its claim that the ALJ abused his discretion in refusing to grant a second continuance of the hearing.

The ALJ's summary decision was ultimately a legal finding based upon undisputed facts. SVT's Brief repeats a number of these facts in an effort to challenge the ALJ's decision holding SVT liable for E-3 wages. For example, SVT states that it issued Vora a termination letter and that Vora requested that he be allowed to remain in the guest house SVT provided. SVT alleges that any e-mails concerning job opportunities that Vora received from SVT following his termination were e-mails routinely sent to many individuals to inform them of job opportunities. SVT Br. at 7-8. Even assuming these facts to be true, we conclude, as did the ALJ, that SVT failed to effect a bona fide termination.

In signing and filing an LCA, an employer attests that for the entire "period of authorized employment," including non-productive time, it will pay the required wage to the H-1B or E-3 nonimmigrant.[11] However, an employer need not pay wages for the entire period "if there has been a *bona fide* termination of the employment relationship."[12] When there is a "*bona fide* termination of the employment relationship" the "DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled (8 C.F.R. 214.2(h)(11)), and require the employer to provide the employee with payment for transportation home under certain circumstances (8 C.F.R. 214.2(h)(4)(iii)(E))." 20 C.F.R. § 655.73l(c)(7)(ii). DHS regulations state that "petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of the beneficiary which may affect eligibility." 8 C.F.R. § 214.2(h)(11) (2013). "If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition." 8 C.F.R. § 214.2(h)(11).

The Board has held that to effect a bona fide termination, the employer must take three steps:

> It must give the employee notice that the employment relationship is terminated. It must notify the Department of Homeland Security [USCIS] that the employment relationship has been terminated. And it must provide the employee with payment for transportation home under certain circumstances.[13]

We agree with the ALJ that SVT failed to effectuate a bona fide termination of Vora's E-3 employment prior to expiration of the period of authorized employment. SVT admits that it did not give the USCIS written notification that it had terminated Vora, as the regulations require. SVT also admits that it did not provide USCIS with Vora's name or any other data that would enable USCIS to identify Vora. Further, Sadhu stated in his deposition that he did not expect Vora's E-3 petition to be cancelled following his call to USCIS. Admin. Mot. for S.D. Ex. 17, p. 70-71.

Regulation 20 C.F.R. § 655.73l(c)(7)(ii) states in part that "DHS regulations require the employer to notify the DHS that the employment relationship has been terminated so that the petition is canceled." As the ALJ reasoned, "[i]nherent in the requirement that the Department

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[11] 20 C.F.R. § 655.731(a).

[12] 20 C.F.R. § 655.731(c)(7)(ii).

[13] *Gupta*, ARB No. 05-008, slip op. at 5 (citations omitted).

of Homeland Security be notified of the termination of the employment relationship is that the notice must be effective enough to allow immigration authorities to take the proper steps to cancel the visa." D. & O. at 5. Verbal notification to USCIS that an unnamed E-3 employee was terminated would not enable USCIS to identify which E-3 petition to cancel and does not therefore meet the requirement contained in 20 C.F.R. § 655.731(c)(7)(ii). Without the bona fide termination, SVT owes Vora wages during Vora's employment in productive status.

3. Employment relationship between SVT and Vora continued

We also agree with the ALJ that the undisputed facts of record demonstrate that Vora's employment relationship with SVT continued after he was allegedly terminated. D. & O. at 5. *See Innawalli v. Am. Info. Tech. Corp.*, ARB No. 04-165, ALJ No. 2004-LCA-013, slip op. at 7 (ARB Sept. 29, 2006) ("We give no effect to AITC's April 26, 2002 and November 18, 2002 letters to the INS terminating Innawalli's employment because the company continued to act as if a termination never occurred."). Employees of SVT continued to e-mail Vora concerning job opportunities and sample resumes after his alleged termination. D. & O. at 5. Vora also received training from SVT following his January 31, 2008 termination date and continued to live rent-free in the SVT guest house. *Id.* These undisputed facts demonstrate a continuing employment relationship that contradicts a bona fide termination of Vora's employment on January 31, 2008.

4. Issues waived

The Administrator the calculated back wages due Vora based upon a prevailing wage of $49,254.00. The ALJ affirmed the award but subtracted wages for the disputed eight-week period. The ALJ awarded Vora $30,499.51 in back wages and SVT did not appeal this amount. Before the ALJ, SVT argued that deductions from Vora's wages should be allowed because SVT provided Vora with room and board. The ALJ denied any such deductions because of insufficient evidence of a voluntary, written agreement. SVT did not appeal the ALJ's determination.

CONCLUSION

For the reasons stated above, we **AFFIRM** the ALJ's summary decision awarding Vora $30,499.51 in back wages based upon undisputed evidence demonstrating that SVT failed to effect a bona fide termination of Vora.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge